

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
 APPELLATE SIDE
 Civil Application No.1902 of 2006
 In
 Second Appeal No.144 of 1996

SmtGangubai Shivram Borate & ors.	Applicants
Vs.	
Mohamed Yusuf Gulam Sarvarkhan @ Dilip Kumar	Respondent

Mr.R.M.Agrawal with Mr.G.R.Agrawal for applicants.
 Mr.Sayeed Akhtar for respondent.

CORAM: B.H.MARLAPALLE, J.

April 27, 2007.

P.C.

1. Heard Mr.Agrawal, the learned counsel for the applicants and Mr.Sayeed Akhtar, the learned counsel for the respondent. This is an application for restoration of Second Appeal No.144 of 1996. The said appeal had come up for final hearing before this Court on 1/8/2003 and when it was called out none from the either of the sides was present before this Court. The learned Judge, therefore, dismissed the Second Appeal for non-prosecution by passing the following order:

"1. This appeal is on the cause list of this Court commenced from 28/07/2003. As per its turn it was called out in the morning

session on 31/7/2005, however, none was present for the appellants as well as respondent. The appeal was kept back. This appeal could not be called out at 2.45 p.m. on 31/7/2003 because of a part heard matter.

2. Today in the morning session, this appeal was again called out. However, none was present for the appellants as well as respondent and, therefore, the matter was kept back. This matter is again called out at 2.45 p.m., however, none present for the appellants, as well as respondent. The appeal, therefore, stands dismissed for non prosecution and disposed of accordingly without any order as to costs."

2. In the second appeal admittedly the applicants - appellants were being represented by Shri V.Z. Kankaria, the learned Advocate and Mr. Akhtar was appearing for the respondent. This application has been filed for the first time on or about 27th November 2006 i.e. after more than three years from the date of dismissal of the Second Appeal for non-prosecution. The respondent has filed reply to

this application through his Constituted Attorney and
opposed this application.

3. Mr.Agrawal, the learned counsel for the appellants-applicants submitted that the delay caused in filing the restoration application is solely on account of the mistake of the learned Advocate for the appellants and his failure to inform the appellants in time about the dismissal of the Second Appeal for non-prosecution. The affidavit of Shri Kankaria has been filed and is relied upon in support of these contentions. There can be no dispute that the application for restoration of an appeal dismissed for non appearance is required to be filed within thirty days and, therefore, this application has been filed beyond time by 3 years and 95 days as has been recorded by the Registry. Mr.Agrawal in support of his prayer for condonation of delay and restoration of the Second Appeal relied upon the following judgments of the Supreme Court:

(1) Rafiq & anr. v. Munshilal & anr. **[AIR**

1981 SC 1400];

(2) Collector, Land Acquisition, Anantnag v.

Mst. Katiji & ors. [AIR 1987 SC 1353];

(3) N. Balakrishnan v. M. Krishnamurthy
[AIR 1998 SC 3222];

. As per Mr.Agrawal the litigant should not be allowed to suffer by following a pedantic approach and he also pointed out that the applicants are semi literate and they do not have a male member in their family who would keep in touch with the learned Advocate in the High Court so as to monitor the progress of the pending appeal. Mr.Agrawal also submitted that no prejudice is likely to be caused to the respondent if the appeal is restored because the respondent is already in possession of the suit land admeasuring about 20 acres, consequent to the order passed by this Court.

4. Mr.Akhtar on the other hand has pointed out that no separate application for condonation of delay has been filed, the reasons given for condonation of delay, viz. failure on the part of the Advocate to communicate the dismissal of the second appeal is not satisfactory, the applicants have time and again taken law in their hands inasmuch as when the decree

passed by the trial Court was stayed upto 16/8/1987, in the month of July 1987 forcible possession of the suit land was taken by the appellants and they remained in possession for more than ten years. He further pointed out that inspite of the status quo order passed by the lower Appellate Court, the appellants proceeded to enter their names in the record of rights in connivance with Talathi on or about 15/1/1998 and on the basis of these entries they borrowed an amount of Rs.5 lakhs from another Bank by hypothecating the suit land. He has also pointed out the high-handed behaviour of the appellants in filing Criminal Complaint No.273 of 2001 against the respondent before the Chief Judicial Magistrate at Nashik for the offences punishable under Sections 403, 406, 419, 420, 423, 424, 465, 468 and 471 read with Section 34 of IPC. Mr.Akhtar has elaborately dealt with the subsequent events which caused immense harassment and public indignity to the respondent who is a well-known national figure. Mr.Akhtar, therefore, submitted that there is no case made out to condone the delay caused and more so when there is no satisfactory explanation for the Advocate of the appellants to remain absent when the appeal was dismissed for non-prosecution and subsequently

the applicants keeping mum for a period of more than three years.

5. Mr.Kankaria, the learned Advocate who was appearing for the applicants in the second appeal in his affidavit states that he has a standing of 40 years as an Advocate of this Court and he was appearing in the second appeal for the appellants. He states that due to oversight and mistake on his part as well as on the part of his staff, the appeal was dismissed for default. He also states that due to the mistake on his part or on the part of his staff, the applicants should not be allowed to suffer.

6. In the case of Rafiq (Supra) the Apex Court held that if an appeal is dismissed for default of appellant's counsel, the appellant should not suffer for the misdemeanour or inaction of his counsel. In the subsequent decision in the case of Collector, Land Acquisition, Anantnag the following principles have been laid down to adopt a liberal approach in condoning delay on account of sufficient cause:

"3. "Every day's delay must be explained"

does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.

4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.

5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk."

7. It is a fact that there is no application for condonation of delay filed in this application though there is a prayer set out in the application. It is also true that the applicants have resorted to some actions which they should not have. The sale transaction for the consideration of Rs.7,000/- in

respect of the suit land admeasuring 7 hectares and 83 R. dates back to 18th September 1964. Almost after eleven years Regular Civil Suit No.355 of 1975 was filed by the present applicants seeking cancellation of the sale transaction. As per the respondent he was put in possession after the consideration amount was handed over and he remained in possession till the appellants obtained forcible possession in July 1987. The suit was decreed on 29th April 1987 and the said decree was stayed till 16th August 1987. The respondent had filed Civil Appeal No.377 of 1987 which was allowed by the learned 3rd Addl. District Judge on 8th December 1995. The said order has been challenged in Second Appeal No.144 of 1996 and as per the order passed by this Court on 23/1/1998 the respondent was put in possession of the suit land though it was directed by way of interim relief that the sale deed would not be executed. It is not necessary to consider the merits and demerits of the respective parties challenging the decrees which are subject matter in the second appeal. The only question that is required to be considered is whether the delay of more than three years deserves to be condoned in the facts of this case and on the touchstone of legal position as referred to

hereinabove, for restoration of the second appeal.

8. There is no dispute that the respondent is in possession of the suit land as at present and if the applicants have taken law in their hands by raising loan by hypothecation of the suit land, they would suffer the consequences depending on the outcome in the second appeal. The trial Court was in favour of the applicants whereas the lower Appellate Court has held in favour of the respondent and, therefore, the second appeal requires to be decided on merits. The applicants were required to file separate application for condonation of delay but failure to do so cannot be the sole reason to reject the prayer for condonation of delay. The learned Advocate appearing for the appellants has candidly admitted that it was the fault on his part or the fault of his staff when the second appeal was dismissed for non-prosecution and the said order was not noticed for a period of more than three years. Less said is the better in this regard and it will have to be remembered that the litigants should not be allowed to suffer on account of lapses of the learned Advocates or their staff. Having regards to the legal position as has been crystalised in the above decisions, I am

satisfied that the delay caused in filing this restoration application deserved to be condoned and the same is hereby condoned, subject to payment of cost quantified at Rs.2000/-. The cost amount shall be remitted to the Maharashtra State Legal Services Authority within a period of two weeks from today.

9. The application is allowed in terms of prayer clause (c).

10. The appeal be listed for final hearing in due course but at the same time let it be noted by the applicants that any high handed steps or any illegal action by resorting to filing frivolous complaints is not going to advance their cause in the lis pending before this Court and I hope they would refrain from indulging any such acts henceforth and wait for the decision in the second appeal on its own merits.

(B.H.MARL